Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-440

PLEASURE DRIVEWAY AND PARK DISTRICT OF PEORIA, ILLINOIS, an Illinois Political Subdivision, JOHN R. CANTERBURY, JAMES A. CUMMINGS, BONNIE W. NOBLE, CLYDE WEST, HAROLD A. (PETE) VONACHEN, JR., Individually and Members of the Board of Trustees of the Pleasure Driveway and Park District of Peoria; RHODELL E. OWENS, Individually and as Director of Parks and Recreation; JACK M. FULLER, Individually and as Administrative Assistant; DANIEL B. OHLEMILLER, Individually and as Business Administrator; FRANK D. BORROR, Individually and as Superintendent of Maintenance; WILLIAM McD. FREDERICK, Individually and as Attorney of Pleasure Driveway and Park District of Peoria; GOLF SHOP MANAGEMENT, INC., an Illinois Corporation; and GORDON RAMSEY,
Petitioners,

v.

WILLIAM KUREK, WALTER DURDLE, ROBERT TOGIKAWA, EDWIN JONES and RICHARD HOADLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

This reply to respondents' brief in opposition is filed for the purpose of indicating to this Court that in the new matter contained in respondents' brief there are serious errors associated with respondents' attack on petitioners' Statement of the Facts

and reasons for granting the Writ of Certiorari set forth in Point III of the petition. Petitioners' Statement of the Case and Part III of the Reasons for Granting the Writ are completely accurate, supported by findings of the state courts after full evidentiary hearings, and supported by state Appellate Courts' affirming opinions. The statement of the case relied on by respondents as contained in the Seventh Circuit Court of Appeals opinion is merely a recitation by that court of unproved allegations in respondents' complaint which seeks to relitigate already decided facts. Contrary to respondents' statement at page 12 of their brief that petitioners

> "Are asking this Supreme Court of the United States to resolve in their favor what they claim are disputed fact questions on the pleadings."

Petitioners are asking this Court to recognize, and ultimately remedy, the serious consequences of the Seventh Circuit's decision which, if allowed to stand, permits the respondents to litigate claims, the operative facts of which have been thoroughly litigated and relitigated in petitioners' favor at all levels of the state courts.

We stand squarely behind the accuracy and completeness of every statement and every quotation from state court actions and from reported cases that we have made. The brief for respondents in opposition to our petition misstates the Seventh Circuit Opinion, the Illinois Constitution, the decisions of the Illinois State Courts, and the cited decisions of this Court. We believe all of those misstatements, misquotes and misinterpretations are patent in the documents and decisions to which they refer.

Page 9 of respondents' brief in opposition states:

> "This case can only be tested as if respondents had succumbed to the coercion and entered into contracts with the park district . . ."

Such an assumption or such a test is pure supposition and never came to pass. In fact the state courts held the negotiations for such contracts to be valid, although unsuccessful, negotiations. The proposition that a lawsuit may be based upon assumed facts is without merit.

We have already discussed *Mt. Healthy City School District v. Doyle*, — U.S. — (1977) at length, and we stand by our interpretation. Respondents are mistaken in their interpretation as they stop short of the decisive ruling in that case:

> "We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to an constitutional violation justifying remedial action. *We think that it would not.* (Emphasis supplied).
>
> "A rule of causation which focuses solely on whether protected conduct played a part 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." (97 S.C. 568, at 575).

As to respondents' interpretation of *Perry v. Sinderman*, 408 U.S. 593 (1972), the court said in that case:

> "Proof of such a property interest (de facto tenure) would not, of course, entitle him to reinstatement but such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds of his nonretention and challenge their sufficiency."

Here although a grievance procedure was available, respondents failed to ask for a hearing. Suffice it to say the Appellate Court of Illinois for the Third District recognizes this to be the situation as it said in Case No. 76-14 (set out in full at Appendix H, A-61 in the original petition):

> "Furthermore, while various procedures give all park district employees the right to present grievances to the park district the defendants failed to avail themselves of such an opportunity."

In part III of respondents' brief, at page 12, is the worst perversion of the facts that respondents have yet employed. To charge petitioners with "continuing 'pattern of baseless, repetitive claims' that are being used as an anti-competitive device . . ." is a factually baseless attempt to bring the case under this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The true fact of the matter is that of all the actions that have been brought and all the appeals that have been taken, approximately 22 in number, petitioners brought only those actions and took only the appeal which were necessary to protect the public interest. Petitioners did initiate the original Forcible Entry and Detainer suit, and the recently affirmed damage claim against respondents. The third suit which petitioners initiated was an injunction suit to prevent respondents from continuing filing of harassing possessory actions which resulted in the granting of the injunction and the assessing of attorneys fees against respondents. Respondents initiated all the remaining actions and appeals. Furthermore all of the state court litigation has been decided favorably for petitioners. Therefore, the charge petitioners engaged in a pattern of baseless and repetitive litigation is without foundation.

At page 13 of their brief the colloquy set forth between Judge Pell and Mr. Altenberger during the oral argument in the Seventh Circuit, and the argument that Mr. Altenberger

made an admission waiving collateral estoppel or *res judicata* is an obvious attempt by respondents to divert this Court's attention from the significant issues raised by Part III of the petition. The question asked by Judge Pell was:

> "Are you, excuse me for interrupting but you got—you have a limited time here to get to the ultimate issue, are you relying primarily on *Noerr-Pennington* or are you relying upon the fact of *res judicata* some way out of the fact that they could have litigated the antitrust issue in the state proceedings?"

We suggest that the key words or phrases in Judge Pell's question are: "you have a limited time here . . .": the use of the word "primarily" as opposed to "exclusively"; and the phrase "they could have litigated the antitrust issue in the State Court proceedings". The Seventh Circuit alloted petitioners only 10 minutes to argue the significant issues presented by this case, and these had to be shared with co-counsel. Obviously not all the issues could be argued in depth. So the court was indicating it wanted to hear petitioners' primary, not only, argument, as to the antitrust issue. The petitioners' main argument in Part III of the petition is that the operative facts upon which the antitrust claim is based have been determined by the courts in petitioners' favor, and that the Seventh Circuit erred when it assumed as correct, facts alleged in the Complaint which had been found by the courts to be to the contrary. While this colloquy referred only to the antitrust portions of the controversy it does not amount to an admission of total non-reliance on collateral estoppel by reason of the prior court action as to that issue. There is nothing in the Opinion below which even suggests such a conclusion. To the contrary, the Opinion discusses the substantive issues of both the anti-trust and civil rights claims. Had the Seventh Circuit considered the colloquy to contain an admission, that Court would have made reference to it.

Petitioners would further suggest that the quoted colloquy between Judge Pell and Mr. Altenberger in no way touched petitioners reliance on equitable estoppel as to Count II, nor did it in any way touch the court decisions which negated those essential operable facts which Judge Pell relied on in his opinion as the "sham" contract of GSM, the intent to have respondents fix prices and restrain trade, all of which were previously adjudicated.

The equitable estoppel defense has gained considerable statute by reason of the affirming opinion of the Third District Illinois Appellate Court in the state court litigation between these parties, where that court states:

> "Of the affirmative defenses specified in defendants' answer, error is assigned on appeal only as to the affirmative defense of fraud. However, in their motion to add as additional authority the opinion of the Seventh Circuit Court of Appeals previously referred to, defendants argue that since the Seventh Circuit Court of Appeals has decided that the plaintiffs may be subject to damages for antitrust violations, we should reverse the trial court's dismissal of defendants' affirmative antitrust defenses. We decline to do so. Having failed to initially allege and argue the dismissal of the antitrust defense, defendants have waived whatever assignment of error they might have had to that dismissal. We therefore do not consider whether the affirmative antitrust defense alleged was meritorious."

Petitioners suggest the state Appellate Court action, after respondents had filed the Seventh Circuit's opinion with it and the admissions in respondents' petition in filing the Seventh Circuit's opinion with that Appellate Court make equitable estoppel conclusive as to Count II and conclusive as to the operable facts of Count I.

Respondents further argue, at page 14, that since the federal courts have exclusive jurisdiction of antitrust matters that *res judicata* or collateral estoppel doesn't apply since most of the prior adjudications were by state courts. That argument has two major flaws: First that claim in effect would mean that "exclusive jurisdiction" was a license for lower federal courts to review and "reverse" prior court adjudications and findings of fact underlying and crucial to the attempted statement of an antitrust cause of action. It is one thing to argue that since federal courts have exclusive jurisdiction in antitrust cases, that they alone can consider whether certain allegations state a cause of action under those antitrust laws, but quite another thing to suggest that exclusive jurisdiction is license for a lower federal court to disregard or even "reverse" other court findings which would otherwise preclude the *allegations* set forth to state a cause of action. Not that the prior adjudications preclude the statement of a cause of action, a matter solely in the jurisdiction of federal courts, but that certain underlying facts are adjudicated and cannot, with due respect for the other courts, be altered or reversed to attempt to state a cause of action. *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930); *Daniels v. Thomas*, 225 F.2d 795 (CA 10, 1955); *Singer v. A. Hollander & Son, Inc.*, 202 F.2d 55 (CA 3, 1953); *Collidotronics, Inc. v. Stuyvesant Insurance Company*, 290 F.Supp. 978 (DC-Pa. 1968), affirmed 412 F.2d 1186 (CA 3, 1969); See also *Skolnick v. Martin*, 32 Ill.2d 55 (1965) and *Illinois v. Borchers*, — Ill.2d — (Sept. 20, 1977, No. 48666).* Here those facts have been determined, and the allegations have been adjudicated as false and unsupported, yet the Court of Appeals assumed them as true. Clearly that court and the respondents confuse the judgment of whether an antitrust cause of action is stated (one within the federal courts' exclusive jurisdiction) with the findings of certain basic facts which serve as fundamental elements of the complaint itself (there *no* court has an exclusive right to determine the truth or falsity of such

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* The *Borchers* opinion is attached hereto as Appendix AA since it has not yet been published.

allegations, *but* after once being determined, the doctrines of *res judicata* and collateral estoppel, to avoid multiplicity of actions, minimize the waste of judicial resources, afford the public and the parties the security of the judgments they are entitled to, and *avoid inconsistent results*, dictate that they can not be reconsidered except by proper and timely appellate review) *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Hanna v. Home Insurance Company*, 281 F.2d 298 (CA 5, 1960); *Williams v. Tooke*, 108 F.2d 758 (CA 5, 1940); and *Hendron v. Yount-Lee Oil Co.*, 108 F.2d 759 (CA 5, 1940).

The second flaw however is more significant in light of the circumstances of this case and the argument in Part III of the Petition which respondents have disputed, namely that for a federal court to utilize the license referred to above to reverse or undermine the prior court decisions is the essence of the abuse of the doctrines of comity and full faith and credit which we have earlier emphasized. Such a tension cannot be permitted by this Court under the guise of some attenuated doctrine of "exclusive jurisdiction" to determine elemental facts in disregard of prior adjudications.

CONCLUSION

For the foregoing reasons, and those set forth in the original petition, a writ of certiorari should be granted.

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Dated: October 24, 1977

APPENDIX

APPENDIX AA

OPINION

SUPREME COURT
OF ILLINOIS

United States of America

State of Illinois
Supreme Court } ss

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and seventy-seven, within and for the State of Illinois.

Present: Daniel P. Ward, Chief Justice

Justice Robert C. Underwood Justice Joseph H. Goldenhersh

Justice Howard C. Ryan Justice William G. Clark

Justice Thomas J. Moran Justice James A. Dooley

William J. Scott, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that afterwards, to-wit, on the 20th day of September, 1977 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,
Appellee,

No. 48666 vs.

Webber Borchers,
Appellant.

Appeal from
Circuit Court
Sangamon County

Clell L. Woods

Clerk of the Supreme Court
State of Illinois

Docket No. 48666—Agenda 7—May 1977.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WEBBER BORCHERS, Appellant.

MR. CHIEF JUSTICE WARD delivered the opinion of the court:

The defendant, Webber Borchers, was elected to the Illinois House of Representatives in 1968. In the spring and early summer of 1970, he submitted two vouchers to the State of Illinois for payment. The first requested payment of $1,500 to Jeanette Weber for secretarial and clerical services performed for Borchers between September 1, 1969, and January 31, 1970. The second requested that the State pay Miss Weber $150 for secretarial services she performed for the defendant in June of 1970. Both vouchers required Borchers to certify "that the services or materials represented in this voucher were received or authorized, that the amount is correct and hereby approved for payment." Accompanying the vouchers were "bill forms" signed by the defendant in which the purpose or reason for the payment was also stated.

The only secretarial or clerical services performed by Miss Weber for the defendant were the filling out of the two vouchers and the typing of a few letters. Miss Weber did not receive any of the funds obtained from the filing of the vouchers. When the warrants for $1,500 and $150 were sent to her by the State, she endorsed them and turned them over to her employer, Christian Homeier, who was the defendant's seatmate in the legislature. Borchers received approximately $1,200 of the $1,650 from Homeier, and Homeier retained the balance.

In November of 1974, the defendant and Homeier were named as defendants in an 18-count indictment returned in the United States District Court for the Southern District of Illinois. Borchers was charged in two counts with mail fraud (18 U.S.C. sec. 1341 (1970)) and in one count with conspiring with Homeier to violate the mail fraud statute (18 U.S.C. sec. 371 (1970)). In essence the indictment charged that Borchers devised a scheme to defraud the State of Illinois by falsely representing that Jeanette Weber performed secretarial and clerical services for him, that he used the mails in furtherance of the scheme and that he conspired with Christian Homeier to commit the substantive offenses charged in the first two counts. Borchers was tried before a jury and was found not guilty.

In January of 1975 Borchers was indicted in the circuit court of Sangamon County. He was charged in several counts with perjury, theft and official misconduct. This indictment was dismissed on the motion of the State's Attorney, and a superseding indictment charging the same offenses was returned in April of 1975. Defendant was tried in November 1975 in the circuit court of Sangamon County. Prior to trial, all of the counts against the defendant were dismissed on his motion except for three counts charging theft of more than $150, theft of less than $150, and official misconduct. The indictment as it remained charged in substance that Borchers committed two crimes of theft when he submitted the vouchers and received

the money and that he committed official misconduct in that while a member of the legislature he committed the crime of theft. A jury found him guilty on the three charges. The trial court held unconstitutional section 115-4(f) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 115-4(f)), which concerns the *voir dire* examination of jurors. Defendant appealed directly to this court under our Rule 302(a), which provides that "[a]ppeals from final judgments of circuit courts shall be taken directly to the Supreme Court (1) in cases in which a statute * * * of this State has been held invalid * * *" (58 Ill. 2d R. 302(a)). Because of the disposition we make of this appeal, we need not consider whether, as the trial court held, the statute unconstitutionally conflicts with our Rule 234 (58 Ill. 2d R. 234). 58 Ill. 2d 302(a).

The defendant contends *inter alia* that the State prosecution was barred by section 3-4(c)(2) of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 3-4(c)(2)), which in part provides:

> "(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the concurrent jurisdiction of this State, if such former prosecution:
>
> * * * * * * *
>
> (2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the prosecution in this State."

The defendant says that this section prohibits "any prosecution by the State in which a fact necessary to convict has been conclusively determined by a prior federal prosecution." His contention is, in effect, that the legislature has extended the doctrine of collateral estoppel to successive prosecution by the Federal and State governments for criminal offenses arising out of the same conduct.

This court recently discussed collateral estoppel in *People v. Williams* (1975), 59 Ill. 2d 557, 560-62:

> "The doctrine of collateral estoppel, which bars relitigation of decided question, applies to criminal as well as civil proceedings. (*People v. Grayson*, 58 Ill. 2d 260; *People v. Armstrong*, 56 Ill. 2d 159; *People v. Haran*, 27 Ill. 2d 229, 232.) This was noted in *Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 475, 90 S. Ct. 1189, where, in the course of describing the doctrine, the court said:
>
> > ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85 [61 L. Ed. 161, 37 S. Ct. 68, 3 A.L.R. 516]'
>
> * * * * * * *
>
> This court noted in *People v. Haran*, 27 Ill. 2d 229, 231, that the doctrine of collateral estoppel was 'well defined' in *Hoffman v. Hoffman*, 330 Ill. 413. There it was said: 'Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question whether the cause of action is the same in both suits or not. This is sometimes denominated

as an estoppel by verdict. (*Public Utilities Com. v. Smith*, 298 Ill. 151.) The rule in respect to the conclusiveness of the verdict and former trial between the same parties, when the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*, is, that it must appear by the record of the prior suit that the particular controversy sought to be construed was necessarily tried and determined,—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter it will be considered as having settled that matter as to all further actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be concluded.' 330 Ill. 413, 417."

There are at times problems presented in seeking to apply the doctrine of collateral estoppel in criminal cases; it is sometimes difficult to determine what facts were actually adjudicated by the former verdict. (See *People v. Haran* (1963), 27 Ill. 2d 229, 235.) Where the prosecution has had to prove several elements, a verdict of acquittal does not inform as to the basis for the jury's verdict. But the difficulties of application are not, of course, insuperable. This was illustrated by the Supreme Court in *Ashe v. Swenson* (1970), 397 U.S. 436, 414, 25 L. Ed. 2d 469, 475-76, 90 S. Ct. 1189, 1194:

"The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied

with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

The defendant says that the only contested issue in both trials was whether he had the required criminal intent. In the Federal trial the question was whether he had a scheme and intent to defraud the State of Illinois, he says, and in the State trial the question was whether he had the wrongful intent to deprive the State of Illinois permanently of the use and benefit of the money. He states that the evidence presented in each prosecution on the issue of intent was the same and that the fraudulent intent that had to be shown in both cases was the same. From this he contends that the Federal jury, by acquitting him, in the language of section 3-4(c)(2), made a "determination inconsistent with any fact necessary to a conviction in the prosecution in this State." That is, he says, since the verdict in the Federal prosecution decided the issue of fraudulent intent the issue was also settled so far as a State prosecution would be concerned and thus the State was barred from prosecuting him. We consider that the defendant's contention is correct.

He has filed here the record in his Federal trial. The evidence in both the Federal and State trials was, with minor exceptions, the same. In both cases the prosecution showed that the defendant signed the vouchers and the bill forms, that Jeanette Weber performed minor secretarial services for the defendant, that she endorsed the warrants and turned them over to Homeier, and that the defendant received approximately $1,200 of the funds obtained. In the Federal trial it was also shown that the mails had been used.

The defendant did not challenge any of this evidence in either of the trials. Indeed, he freely admitted that he had used the vouchers to obtain funds for himself. He testified that in the late 60's and early 70's he was concerned about disturbances at campuses at various State-supported colleges in Illinois. He said that in the spring of 1969 he was approached by Dan Jones, who offered to gather information for him about campus unrest. He testified that over a 12-month period Jones reported to him on numerous occasions about "radical activities" on college campuses and that he used this information to draft bills and resolutions in the legislature. He stated, too, that he paid Jones $2,450 from his own funds for this undercover work and that Jones refused to sign a State voucher or give the defendant his social security number because he, Jones, said that his life would be in danger if his identity became known. At their last meeting in June of 1970, the defendant said, he persuaded Jones to sign cards which showed the date and amount of all the payments he had made to Jones. The defendant said he did not know the whereabouts of Jones and that he was unable to produce Jones as a witness. The copies of the cards were introduced into evidence at both trials.

Borchers said that he felt that the cost of employing Jones was an expense that could be legitimately charged against his legislative expense account. He could not, however, obtain funds for this purpose without Jones' signature on the voucher

and his social security number. He testified that in the early spring of 1970 he approached Christian Homeier, the fellow legislator, and asked Homeier if he knew of a way in which the defendant could secure funds through his expense account to reimburse himself for the expenses he incurred in the employment of Jones. Borchers said that Homeier told him to sign a blank voucher and bill form for $1,500 and that Homeier later gave him $1,100. He said that at that time he was under the impression that the voucher had been filled in to show that the money was to be used for campus investigations and that Homeier was to give the $400 to Jeanette Weber to pay for the income taxes she would owe on the $1,500 since she appeared as the payee on the voucher and to compensate her for some clerical work she had performed for him. He testified that in July of 1970 he had instructed Miss Weber to fill out the second voucher for $150 to show that the money was for investigative purposes; that he signed the voucher before she filled it in, and that he kept $100 and gave her $50 to pay her for some clerical services and to cover her income tax. He stated that he did not find out until October of 1973 that Homeier had kept the $400 from the proceeds of the first voucher and had gotten the $50 from the second voucher and that the vouchers had not been filled in and submitted according to his instructions.

In his closing argument at the Federal trial, the attorney for the defendant stated the only question that was presented by the evidence for the jury's determination:

> "So, we boil ourselves down after all these days of evidence and argument and questions and what have you to a really rather simple narrow issue and that is that when Mr. Borchers submitted these vouchers or caused them to be submitted did he do so with bad faith and with an intent to defraud the State of Illinois and intend to steal money for his own use and benefit, or did he on the other

> hand act in good faith in submitting these vouchers believing that he had a right to use the money to reimburse himself for the payment of the investigator to whom he had advanced money over a period of time and for whom he submitted these vouchers."

Similarly in the State prosecution, no other question—such as whether the vouchers had been submitted to the State—being in dispute, the only question presented for the jury's determination was the defendant's intent. That question could be stated: "Did the defendant when he submitted the vouchers wrongfully intend to permanently deprive the State of Illinois of the use and benefit of the money or did he intend to use the money simply to reimburse himself for the expenses he incurred in employing the investigator?"

We have reviewed the records in the Federal and State trials, and they are practically alike so far as the evidence presented is concerned. Indeed, it can be said here that the two records excepting, of course, proof of use of the mails, are nearly interchangeable, even as to the reputation witnesses called by the defendant. With a few minor exceptions the testimony is the same. Viewing the question realistically and "set in a practical frame" (*Ashe v. Swenson* (1970), 397 U.S. 436, 444, 25 L. Ed. 2d 469, 475-76, 90 S. Ct. 1189, 1194) we consider that the questions were the same. The controlling fact or question in both prosecutions was whether or not the defendant had an intent to commit a fraud. The verdict of acquittal in the Federal prosecution resolved this factual question in favor of the defendant, and his conviction under the State prosecution required that the same factual question be resolved in favor of the prosecution. Thus relitigating this factual question was violative of the doctrine of collateral estoppel.

A case with resemblance to the one here is *Johnson v. Estelle* (5th Cir. 1975), 506 F.2d 347, *cert. denied* (1975), 422 U.S. 1024, 45 L. Ed. 2d 682, 95 S. Ct. 2619, which involved a

question of specific criminal intent. There the United States Court of Appeals for the Fifth Circuit held that under the doctrine of collateral estoppel a second prosecution was barred in a case in which one of the questions presented to the juries in two successive trials was whether the defendant had an intent to commit rape. Billy Lee Johnson was found not guilty of "burglary of a private residence at nighttime with intent to commit rape," and five months later he was convicted of "assault with intent to commit rape." (506 F.2d 347, 348.) Both charges grew out of the same incident of home invasion. The court first noted that only two issues were presented at the first trial upon which the jury could have based its verdict of acquittal and which were at issue in the second trial: (1) Was Johnson the assailant; and, (2) did the assailant have the intent to commit rape. (506 F.2d 347, 350.) The court then concluded that the second prosecution was barred by the doctrine of collateral estoppel because the jury in the first trial in order to have acquitted Johnson must have found against the prosecution on one of the two issues and because the prosecution had to prove both issues in the second trial in order to have obtained a conviction. The court was not impressed by the speculative contentions of the State that the first acquittal might have been grounded on a relatively minor distinguishing circumstance, for example, a failure to prove the private character of the residence entered or that the defendant entered without breaking. The court said:

> "By its injunction to apply collateral estoppel with 'realism and rationality' we believe that the Supreme Court [in *Ashe*] means that we should not allow a second trial, merely because technical requisites of the first charge are not involved in the second, where there is no evidence suggesting that those factors were even presented to the first jury for its active consideration. * * *
>
> We are convinced that both juries stood their decisions on identity of assailant and intent to rape and did not

engage in mental gymnastics so as to land on differing components." *Johnson v. Estelle* (5th Cir. 1975), 506 F. 2d 347, 352. See also *United States v. Brown* (8th Cir. 1977), 547 F.2d 438, *cert denied* (1977), — U.S. —, 51 L. Ed. 2d 784, 97 S. Ct. 1566; *McDonald v. Wainwright* (5th Cir. 1974), 493 F.2d 204; *United States v. Nash* (4th Cir. 1971), 447 F.2d 1382.

For the reasons given, the judgment of the circuit court is reversed.

Judgment reversed.